No. 72-1997

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

HARLAN COAL COMPANY, *Petitioner,* v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	ON PETITION for Review and Cross-Application for Enforcement of an Order of The National Labor Relations Board.

Decided and Filed January 10, 1974.

Before: WEICK, EDWARDS and MCCREE, Circuit Judges.

MCCREE, Circuit Judge. This petition for review of on order of the National Labor Relations Board by the Harlan #4 Coal Company and the cross-application for its enforcement by the Board require us to determine whether there is substantial evidence on the record as a whole to support the Board's determination that the company's refusal to bargain with its employees' certified bargaining agent was an unfair labor practice in violation of sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. § 158 (a),(5)(1). We hold that there is.

The events culminating in this appeal began over three years ago on May 28, 1970, when a majority of the employees of the Harlan #4 Coal Company (the company) voted against having the United Mine Workers of America

(the union) act as their exclusive bargaining representative. The union filed with the National Labor Relations Board timely objections to the election alleging that the company's improper conduct during the election campaign invalidated the result. On February 23, 1971, a hearing officer founded that the company had engaged in improper conduct and recommended that the election be set aside. This determination was affirmed by the Board's Regional Director and a second election was directed. The company's request for review by the Board was denied because there were no substantial issues warranting review.

On May 5, 1971, the company filed a motion requesting that a new bargaining unit or different bargaining units be determined in light of changed conditions and circumstances including the closing of one mine and the opening of another. The Regional Director stayed the second election and ordered a hearing to determine the appropriate bargaining unit. On August 5, 1971, the Regional Director issued an order in which he redefined the appropriate bargaining unit to include all production and maintenance employees working in or around the coal mines of the company and at its K.O.K. No. 1, K.O.K. No. 2 and K.O.K. No. 3 division mines. The company did not file a request for review of this redefinition of the unit prior to the second election.

On September 23 1971, a majority of the company's employees voted for the union. Shortly thereafter, the company filed four objections to the election contending that: (1) union representatives stationed themselves adjacent to the voting area and gave company employees the impression of surveillance and "checking off": (2) on the eve of the election the union president sent to company employees a letter containing a material misrepresentation to which the company had no opportunity to respond;

(3) the union disseminated false information that the company had coerced and intimidated its employees; and (4) the provision on the election ballot for a "neither" vote to be checked if an employee wanted neither of the two unions participating in the election to represent him was misleading.

The Regional Director, in a supplemental Decision and Certification of Representation determined that the company's objections were without merit and, on November 15, 1971, certified the United Mine Workers as the exclusive bargaining agent of the company's employees. The company's request for review of the certification by the Board was denied on February 2, 1972, because it failed to raise substantial questions warranting review.

Meanwhile, on November 29, 1971, the union had requested the company to bargain. On December 10, the company's president informed the union that a request for review of the Regional Director's decision was pending and that the union should call back after the disposition of that request. On December 14, 1971, and again on February 4, 1972, two days after the Board had refused the requested review, the union requested the company to bargain. These requests were refused.

On February 22, 1972, the union filed with the Board an unfair labor practice charge that the company had refused to bargain with it even though it had been properly certified as the exclusive bargaining agent. On March 29, the General Counsel to the Board issued a complaint and notice of hearing against the company. On April 6, the company answered that it had not refused to bargain and that the election had been conducted in an inappropriate unit. On June 8, the General Counsel filed with the Board a motion for summary judgment against the company.

Five days later, the Board issued an order transferring the proceedings to it, and a notice to show cause why the motion should not be granted. On June 23, the company filed a memorandum in opposition to the General Counsel's motion. The Board held that the issues raised by the company in opposition to the motion either had been or could have been litigated in the prior representation proceeding and therefore could not be relitigated in the unfair labor practice proceeding in the absence of newly discovered or previously unavailable evidence. Accordingly, it granted the motion for summary judgment. In its Decision and Order issued on September 18, 1972, 199 NLRB No. 15, the Board found that the company's refusal to bargain with the union violated sections 8(a)(5) and (1) of the National Labor Relations Act, reaffirmed the certification of the United Mine Workers, and required the company to bargain with it upon request and to post appropriate notices.

In this appeal from that order, the company argues that its refusal to bargain did not constitute an unfair labor practice because the election of September 23, 1971, should have been set aside for two reasons. First, the Regional Director should have held a hearing to determine whether union representatives improperly surveilled and checked off company employees. Second, the letter sent by the union president to company employees on the eve of the election contained a material misrepresentation to which the company had no opportunity to respond thereby destroying the "laboratory conditions" necessary to a valid election.

In reviewing the decision of the Labor Board, we observe that Congress has entrusted to the Board considerable latitude in resolving disputes concerning representation, and that our task is to determine whether the Board

has acted arbitrarily in the exercise of its "wide degree of discretion." *E.g., NLRB* v. *A. J. Tower Co.*, 329 U.S. 324, 330 (1946); *NLRB* v. *Tennessee Packers, Inc., Frosty Morn Division*, 379 F.2d 172, 180 (6th Cir. 1967) *cert. denied*, 389 U.S. 958. We also observe that a party objecting to the validity of an election on the grounds of improper pre-election conduct must shoulder a heavy burden of proof to demonstrate by specific evidence that the election was unfair. *E.g., NLRB* v. *Mattison Machine Works*, 365 U.S. 123, 124 (1961); *NLRB* v. *Dean Foods Co.*, 421 F.2d 664, (6th Cir. 1970) *cert. denied*, 398 U.S. 939.

UNION SURVEILLANCE

In support of its objection that the union engaged in improper surveillance of its employees, the company submitted only a single affidavit by its treasurer, Ralph Fortner, who stated:

> As I left the voting place just before 8 o'clock, I noticed that Philpot and Hall, Petitioner representatives, went to an automobile which was parked about 20 feet from where the employees were lining up to vote.. The headlights of that car pointed in the direction of the employees. The Petitioner representatives seated themselves inside the car in the front seat and were looking through the front windshield at the employees . I proceeded away from the area with other Employer representatives and walked down a railroad track about 400 to 500 feet. I was concerned as to whether the Petitioner representatives had left the voting area. I climbed up on a coal car and looked back and saw that the Petitioner representatives were still in the auto where I had previously seen them. This was at approximately 8:10 to 8:15 a.m. From the angle I was looking I

> could not see any of the voters and they could not see me. I believe by this time most of the employees at the mine had voted. The relationship of the Petitioner representatives to the line of voters was such as to give the clear impression that they had the voting line under surveillance and were checking off voters.

In response, union representatives who were near the polling place submitted affidavits in which they denied any improper conduct and disputed the allegations contained in the company affidavit:

> Immediately prior to the opening of the polls we left the voting area and proceeded about 700 yards from the polling place and parked the car in which we were riding. We did not talk to anyone that voted during the period of time the polls were open and didn't recall that anyone that voted in the election passed our car. The men that voted were practically all at the polls when the polls opened.

The Regional Director declined to hold a hearing to determine whether the union had engaged in improper surveillance. In so doing he relied upon the Board's decision in *A. D. Julliard and Co.*, 110 N.L.R.B. 2197, 2199; *Belk's Department Store of Savannah, Ga., Inc.*, 98 N.L.R.B. 280, 281; and *International Stamping Co., Inc.*, 97 N.L.R.B. 921, 922, where the Board stated:

> Although it is the policy of the Board to prohibit the keeping of any list, apart from the official voting list, of persons who have voted in a Board-directed election in the cases in which this prohibition was enunciated, it was either affirmatively shown or could be inferred from the circumstances, that the em-

ployees knew that their names were being recorded by the Employer. In the instant proceeding, there is no such affirmative evidence; nor may any such be inferred from the circumstances in the case.

Observing that the party alleging the objectionable conduct has the duty to furnish evidence that affords a basis for setting aside an election, *Felix Bonura Company*, 119 N.L.R.B. 1620, and noting the absence of employee complaints of surveillance, the Regional Director found that the company had not adduced any evidence from which he could infer that union representatives either maintained a list of employees or that if such a list had been maintained that employees believed that their names were being recorded at the polling place.

We agree that the company's affidavit supported a finding only that union representatives were at the polling place. Presence alone, in the absence of evidence of coercion or other objectionable conduct, is sufficient to warrant setting aside an election. *Choctaw Privision Company, Inc.*, 122 N.L.R.B .474; *Cooper Supply Company*, 120 N.L.R.B. 1023; *Houston Shell and Concrete Division, McDonough Company*, 118 N.L.R.B. 1511. And since the company's affidavit, if accepted as true, would not require setting aside the election, no evidentiary hearing was necessary. *E.g., NLRB* v. *Air Control Products of St. Petersburg, Inc.*, 335 F.2d 245, 249, 250 (5th Cir. 1964); *cf. NLRB* v. *Tennessee Packers, Inc., Frosty Morn Division, supra.*

THE MATERIAL MISREPRESENTATION

The alleged material misrepresentation was contained in a letter sent by the United Mine Workers president to

company employees on the eve of the election. This letter stated in relevant part:

> Since the last election the company has been sold to U.S. Plywood-Champion Paper, Inc. This [is] one of the largest corporations in the world, and can easily pay the union scale. It is reported that they paid five million dollars to Bill Conley and his associates, including Frank Qualls. Don't be mis-led[sic] by them coming to you now and saying that they are unable to pay the contract. You are aware that your wages are frozen by the action of President Nixon, but if you vote for the United Mine Workers of America, you can get the union contract wages and other conditions. We urge you to think about this for the benefit of yourself and your family.

The company argues on this appeal that this letter deliberately misrepresented that if employees voted for the union they would receive automatically union wages even though other persons' wages were frozen by order of the President. In support of its argument, the company submitted to the Regional Director eight identical employee affidavits which state in relevant part:

> I was led to belive that if this union won the election, I would receive at once the present union contract wages and other benefits, although other people's wages were frozen by President Nixon. This letter did influence my vote and I make this statement on my own free will with no threats or promises from anyone.

In his decision, the Regional Director refused to accord any weight to these affidavits. Moreover, although he found that letter "could be subject to the interpretation that if the employees vote for the petitioner, they

would avoid the legal effect of the wage freeze," he refused to set aside the election on this ground. First, he explained, the employees were aware that no wage increase could be obtained unless the company agreed to it in negotiation with the union and the company had indicated to its employees several times that it would not agree to increased wages. Second, he took "official notice of the fact that the Federal Government has widely publicized the Wage and Price Freeze Program and publicized telephone numbers which citizens can call concerning questions as to the effect of the Wage Price Freeze on specific matters."

Both the failure of the Regional Director to give any weight to the eight identical employee affidavits executed after the election and his decision that the union letter did not constitute a material misrepresentation sufficient to warrant setting aside the election are urged as error before us.

We hold however, that the Regional Director did not err in refusing to give weight to the eight identical employee affidavits and in finding that the letter did not constitute a material misrepresentation so as to warrant setting aside the election. In making this determination, we are mindful of the dangers of permitting otherwise valid elections conducted by secret ballot to be set aside because some voters, after post-election introspection and in response to inquiry by their employers, believe that their votes may have been improperly influenced or because we believe that campaign speeches may have had an impermissible impact on employee free choice.

Our disinclination to find that the Regional Director erred in not permitting statements of voter intention to impeach the validity of secret ballots is consistent with

the holding in *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969). *But cf NLRB* v. *Donnelly Garmet Co.*, 330 U. S. 219 (1947). In *Gissel* the Court, in considering whether the validity of union authorization cards could be impeached by testimony of the card signers about subjective intent for signing the cards, accepted.

> the observation that employees are more likely than not, many months after a card drive and in response to questions by company counsel, to give testimony damaging to the union, particularly where company officials have previously threatened reprisals for union activity in violation of § 8 (a), (1). We therefore reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry. *Id* at 608.

If union authorization cards, often signed in the presence of a union solicitor, may not be impeached by testimony concerning an employee's subjective motivation there is less reason to permit this evidence to impeach the more reliable evidence of an employee's intent — his secret ballot. Indeed, in *Gissel*, the Supreme Court "acknowledged the superiority of the election process" in referring to the Labor Board's policy "that secret elections are generally the most satisfactory — indeed the preferred — method of ascertaining whether a union has majority support." *Id.* at 602.

Attempts to permit the introductiton of such evidence have been spurned by courts before. In *NLRB* v. *Clearfield Cheese Co.*, 322 F. 2d 89 (3rd Cir. 1963), for example, the court enforced a bargaining order of the Labor Board based upon findings that a speech and a letter from the employer to his employees conveying a threat that the employer would go out of business if the union

prevailed in the election had robbed the employees of free choice. In finding that it was not permissible to allow employees to testify that their vote against the union had not been the result of employer coercion, the court explained:

> Nor do we think that the Company's offer of proof in any particular demonstrates an area for factual inquiry demanding a formal hearing, or even that such a hearing if had, would bear fruitful results. Indeed, the preferred testimony of some employees (who presumably would testify favorably for the Company) as to their understanding of the speech and letter does not begin to reach the substance of the matter. But such testimony would invite the further inquiry, in this instance, as to the direction of the witness-employees' thoughts on representation by the Union, or how he cast his vote: an inquiry destructive of the purpose of the secret ballot and creative of the spectre of post-election change of mind. *Id.* at 93-94.

Our approval of the Board's determination not to consider employee affidavits does not, however, preclude inquiry into whether the union's letter constituted a material misrepresentation in violation of the rule established by the Board in *Hollywood Ceramics*, 140 N.L.R.B. 221 and adopted by this court in *NLRB* v. *Louisville Chair Co.*, 385 F. 2d 922 (6th Cir. 1967) *cert. denied* 390 U. S. (1968). In *Hollywood Ceramics*, where the Board sustained an employer's objection to an election because the union had on the eve of the election, distributed misleading comparisons of wages and requisite skills in the employer's plant and in unionized plants, the Board articulated the following rules for determining when misrepresentation is sufficient to set aside an election:

It is obvious that where employees cast their ballots upon the basis of a material misrepresentation, such vote cannot reflect their uninhibited desires, and they have not exercised the kind of choice envisaged by the Act. For this reason, *The Board has refused to certify election results where a party has misrepresented some material fact, within its special knowledge, so shortly before the election that the other party or parties do not have time to correct it, and the employees are not in a position to know the truth of the fact asserted.*

We believe that an election should be set aside only when there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election. However, the mere fact that a message is inartistically or vaguely worded and subject to different interpretations, will not suffice to establish such misrepresentations as would lead us to set the election aside. But even where a misrepresentation is shown to have been substantial, the Board may still refuse to set aside the election if it finds upon consideration of all the circumstances that the statement would not be likely to have had a real impact on the election. For example, . . . the Board may find that the employees possessed independent knowledge with which to evaluate the statements 140 N.L.R.B. at 224.

In this case, there is no question that the challenged letter sent to the employees at a time that prevented the

company from effectively replying to it. We believe, however, that the Board's finding that the campany's attack failed on the other grounds necessary for setting aside an election is supported by substantial evidence considering the record as a whole. First, the letter was not susceptible only to the interpretation urged by the company but instead was ambiguous and subject to several interpretations. Therefore it was insufficient to serve as a basis for setting aside the election. *Hollywood Ceramics, supra.* Second, Information about the wage freeze was not within the "special knowledge" of the union but was, on the contrary, readily available to employees.

We agree with the Regional Director that the letter is subject to the interpretation that if company employees voted for the union they would immediately obtain union scale wages. However, the letter is equally subject to the interpretation that the union could obtain for employees contract wages as soon as it was legal to do so — as soon as the freeze was ended. The letter is at worst delphic and inartistic. It may have been intended to persuade employees that a temporary wage freeze should not dissuade them from voting for the union.

Even if the letter is interpreted as the company would have us do, the Board did not err in concluding that the misrepresentation is conveyed did not have a real impact on the election. Information about the wage freeze was not within the special knowledge of the union. It had been widely publicized and debated. And, the federal government had established places where answers to specific questions about the freeze could be obtained. Moreover, the Regional Director found, and his finding is not unsupported, that the employees were aware that any increase in wages would have to be agreed upon by

the company and that the company had stated several times that it would not agree to an increase. For all these reasons, the findings of the Board have evidentiary support and should not be set aside.

This case is not controlled by *Seneca Knitting Mills*, 59 N.L.R.B. 754 (1944), *Radio Corporation of America*, 102 N.L.R.B. 124 (1953), and *Continental Oil Co.*, 58 N.L.R.B. 169 (1944), upon which the company relies. Each of those cases involved an election in which an insurgent union was seeking to unseat an incumbent union and just prior to the election either the company or the incumbent union announced that a contract previously negotiated them had been approved by the Wage Stabilization Board, an agency authorized to regulate wage increases. These announcements were made by the Board to either the company or the incumbent union in violation of its own rules prohibiting such announcements during the pendency of a representation election. The Board found that this information, to which employees did not have ready access, would have the obvious effect of making employees believe that a vote for the incumbent union would insure the previously negotiated wage increases and that a vote for the insurgent union would nullify the approved contract and perhaps cause employees to lose the approved wage increase altogether.

Nor is this case similar to *Cross Baking Co.* v. *NLRB*, 453 F.2d 1346 (1st Cir. 1971), where the court set aside, the Board's order to bargain because two days prior to the election, the union sent a letter to the employees that contained the misrepresentation that in another plant the union had obtained and the employees had received a wage increase of seventy-five cents per hour when in fact part of the increase had been obtained by another union and the

employees had not yet received the entire increase. In that case, the information was within the special knowledge of the union, and the employer had no opportunity to respond to the letter. We also observe parenthetically that the union won the election in that case by one vote.

CONCLUSION

This case requires us to determine whether on the record as a whole there is substantial evidence to support the Board's determination that the union did not improperly surveil employees and that the letter sent by the union to employees was not a material misrepresentation that would require the election to be set aside. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951); *Cross Co.* v. *NLRB*, 286 F.2d 799, 802, *rehearing denied*, 288 F.2d 188 (6th Cir. 1961). We observe that this standard of review was not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." 340 U.S. at 488.

Our examination of the entire record discloses that there is no factual dispute that union representatives, although present during polling, did not engage in any other conduct that would be improper and that there is no dispute concerning the content of the letter sent by the union president to employees and the timing of its delivery. The

inferences to be drawn from these facts, and the widespread publicity accompanying the announcement and implementation of the wage freeze, the knowledge of the employees that no wage increase could be obtained without company agreement, and the company's statements that it would not agree to an increase, are those peculiarly within the Labor Board's expertise. We therefore defer to it.

Review is denied and enforcement is granted.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HARLAN NO. 4 COAL COMPANY
Case 9-CA-6829
AND
UNITED MINE WORKERS OF AMERICA

DECISION AND ORDER

Upon a charge filed on February 22, 1972, by the United Mine Workers of America, herein called the Union, and duly served on Harlan #4 Coal Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on March 29, 1972, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before a Trial Examiner were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 15, 1972, representative of Respondent's employees in the unit was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unia found appropriate; and that commencing on or about November 30, 1971, and more particularly by a written letter to the Union on or about December 10, 1971, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has required and is requesting it to do so. On

April 6, 1972, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations of the complaint.

On June 8, 1972, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on June 13, 1972, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed, as a response to Notice To Show Cause, a Motion in Opposition to the General Counsel's Motion for Summary Judgment.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and opposition in response to the General Counsel's Motion for Summary Judgment, Respondent contends, in effect, that the unit is inappropriate, that the Regional Director erroneously overruled its objections in the representation case and improperly and unlawfully certified the Union. The General Counsel contends that since the Respondent is attempting to relitigate issues which were or could have been litigated and decided in the representation proceeding, and which therefore may not be relitigated here, he is entitled to Summary Judgment as a matter of law. We agree.

The record in Case 9-RC-8432 reflects that, pursuant to the Regional Director's Decision and Direction of Election, an election was conducted on May 28, 1970, among the production and maintenance employees working at and around the Respondent's coal mines and those of its K.O.K. Coal Company division. The Union failed to receive a majority and, thereafter, filed timely objections. The Regional Director, on October 7, 1970, issued his Supplemental Decision, Order Directing Hearing, and Notice of Hearing, overruling the Union's Objections 2 and 3 and ordering a hearing with respect to Objection 1, which, in substance, alleged that the Respondent intimidated and coerced its employees with threats of plant closure and with statements that the Union would cause, and had forced, small mines to go out of business. After a hearing, the Hearing Officer, on February 23, 1971, issued his Report on Objections to Election in which he recommended that the election of May 28, 1970, be set aside. Thereafter, Respondent timely filed with the Regional Director exceptions to the Hearing Officer's Report.

In his Second Supplemental Decision, Order and Direction of Second Election of March 12, 1971, the Regional Director affirmed the Hearing Officer's rulings and directed a second election. Thereafter, the Respondent filed a Request for Review which the Board, in a telegraphic response, dated April 20, 1971, denied as it raised no substantial issues warranting review.

On May 5, 1971, the Respondent filed a motion to amend the Regional Director's Second Supplemental Decision, requesting him (a) to determine a new unit or different collective-bargaining units in the light of changed conditions and circumstances, including the clos-

ing of one coal mine and the opening of another, called K.O.K. Company Coal Mine No. 2 and (b) to direct a new date for the Respondent to provide a list of names and addresses of employees eligible to vote. Thereafter, on June 22, 1971, the Regional Director stayed the second election and directed a hearing on the substantial and material issues raised by the Respondent's motion with respect to the appropriate bargaining unit and employee eligibility at the new mine.

After a consolidated hearing, the Regional Director, on August 5, 1971, issued his Decision, Order and Amended Direction of Second Election in which, *inter alia*, the Southern Labor Union was permitted to intervene and have its name placed on the ballot in the second election directed in Case 9-RC-8432, and the appropriate unit was amended to describe specifically the three K.O.K. mines.

In the election conducted on September 23, 1971, the Union received a majority of the votes cast. The Respondent, thereafter, filed timely objections to the election alleging, in substance, that (1) the Union gave the impression of surveillance of the voters, (2) the Union made material misrepresentations concerning the wage freeze, (3) the Union disseminated false information that the Respondent had coerced and intimidated its employees, and (4) the ballot's provision for a "neither" vote was misleading. In his Supplemental Decision and Certification of Representative of November 15, 1971, the Regional Director determined that the objections raised no substantial or material issues requiring the election to be set aside and certified the union as the exclusive bargaining representative of the employees in the appropriate unit.

A timely Request for Review of the Regional Director's action was filed by the Respondent alleging, in substance, that he erred in overruling the objections and in his unit determination. The Board, in a telegraphic response dated February 2, 1972, denied the request as it raised no substantial issues warranting review.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8 (a) (5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Respondent is a Tennessee corporation with its principal offices and place of business located at or near Alva, Kentucky, where it is engaged in coal mining operations. During the past 12 months, which is a representative period, Respondent sold and shipped coal valued

in excess of $50,000 in interstate commerce, directly from its coal mining operations in Kentucky to points outside the State of Kentucky.

We find, on the basis of the foregoing, that Respondent, is and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

United Mine Workers of America is a labor organization within the meaning of Section 2 (5) of the Act.

III. The Unfair Labor Practices

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9 (b) of the Act:

All production and maintenance employees working in and around the coal mines of the Harlan #4 Coal Company and its K.O.K. No. 1, K.O.K. No. 2, and K.O.K. No. 3 division mines located in and around Alva, Kentucky; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

2. The certification

On September 23, 1971, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 9, designated the Union as their repre-

sentative for the purpose of collective bargianing with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on November 15, 1971, and the Union continues to be such exclusive representative within the meaning of Section 9 (a) of the Act.

B. The Request To Bargain and Respondent's Refusal

Concerning on or about November 29, 1971, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about December 10, 1971, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since December 10, 1971, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that , by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce

among the several States and tend to lead to labor disputes burdening and abstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as begining on the date Respondent commerce to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226,229, enfd. 328 F. 2d 600 (C.A. 5), cert. denied 397 U. S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Harlan #4 Coal Company is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2 (5) of the Act.

3. All production and maintenance employees working in and around the coal mines of the Harlan #4 Coal Company and its K.O.K. No. 1, K.O.K. No.2, and K.O.K. No. 3 division mines located in and around Alva, Kentucky, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. Since November 15, 1971, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9 (a) of the Act.

5. By refusing on or obout December 10, 1971 and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Harlan #4 Coal Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with United Mine Workers of America as the exclusive bargaining representative of its employees in the following appropriate unit:

All production and maintenance employees working in and around the coal mines of the Harlan #4 Coal Company and its K.O.K No 1, No. 2, and K.O.K. No. 3 division mines located in and around Alva, Kentucky; but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act.

(b) In any like related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its place of business and coal mines and division coal mines located in and around Alva, Ken-

tucky, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C., Sept. 18, 1972.

John H. Flanning, Member

Howard Jenkins, Jr., Member

Ralph E. Kennedy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)